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BEFORE THE ARIZONA CORPORATION COMMISSION

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ARIZONA CORPORATION COMMISSION  
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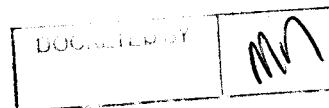
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IN THE MATTER OF THE APPLICATION OF  
ARIZONA PUBLIC SERVICE COMPANY  
FOR A HEARING TO DETERMINE THE  
FAIR VALUE OF THE UTILITY PROPERTY  
OF THE COMPANY FOR RATEMAKING  
PURPOSES, TO FIX A JUST AND  
REASONABLE RATE OF RETURN  
THEREON, TO APPROVE RATE  
SCHEDULES DESIGNED TO DEVELOP  
SUCH RETURN.

Docket No. E-01345A-08-0172

Arizona Corporation Commission  
DOCKETED

OCT -8 2008



RUCO'S REPLY BRIEF

The Residential Utility Consumer Office ("RUCO") hereby submits its Reply Brief in the above captioned matter. RUCO recommends that the Arizona Corporation Commission ("Commission") deny Arizona Public Service Company's ("APS" or "Company") Motion for Approval of Interim Rate and Preliminary Order. However, the judge and the Commissioners that will weigh the Recommended Order need to look carefully at the recent unprecedented financial market activity contemporaneous with the hearing and filings in this matter for further guidance.

THE COMMISSION SHOULD NOT USE ITS BROAD POWERS TO EXPAND THE  
EXCEPTION TO THE FAIR VALUE REQUIREMENT

The Company argues that under Arizona law the Commission does not need to make a finding that an emergency exists to approve interim rates. Company Brief at 5. The Company believes that the law allows the Commission to use its broad powers to expand the otherwise

1 very limited exceptions to the fair value requirement to allow rate relief depending on the  
2 particular circumstances of the case. Company Brief at 5. RUCO respectfully disagrees with  
3 the Company's interpretation of the current state of the law. Perhaps the only valid  
4 generalization on this subject at the present time is there remains disagreement on the legal  
5 requirement of an emergency finding. The oft-quoted Attorney General Opinion on this issue,  
6 from which the courts and most parties in this case have cited, is conflicted. On the one hand,  
7 the Opinion provides:

8           "Only if the Commission finds that an emergency exists may it  
9           approve general changes in the rates of a public service corporation without  
10          first establishing, in an appropriate proceeding, the fair value of the  
11          corporation's property." 71-17 Op. Atty. Gen. at 11 (1971).

12           The Opinion also provides:

13           "In addition, under the *Mountain States Telephone case, supra*, the  
14           inability of the Commission to grant permanent rate relief within a  
15           reasonable time would be grounds for granting interim relief." 71-17 Op.  
16           Atty. Gen. at 13 (1971).

17           Seven years after the Attorney General Opinion was published the Arizona Court of  
18           Appeals relied on the Attorney General's Opinion in *Scates v. Arizona Corporation*  
19           *Commission*, 118 Ariz. 531, 578 P. 2d 612 (App. 1978) ("Scates"). The Court said that interim  
20           rates should only be used in "limited situations where an emergency exists, where a bond is  
21           posted guaranteeing a refund to the utility's subscribers if any payments are made in excess of  
22           the rates eventually determined by the Commission, and where a final determination of just  
23           and reasonable rates is to be made by the Commission after it values a utility's property."  
24           *Scates*, 118 Ariz. at 535. The *Scates* Court left no doubt that interim rates could only be  
25           permitted where an emergency exists.

26           In 1989, the Court of Appeals revisited the issue in *Pueblo del Sol Water Company v.*  
27           *Arizona Corporation Commission*, 160 Ariz. 285, 772 P.2d 1138 (1989). The circumstances in

1 *Pueblo del Sol* involved the transfer of assets from one water company to another. The joint  
2 applicants sought approval of interim rates in the transfer proceeding subject to refund. The  
3 Court of Appeals upheld the interim rates noting, among other things:

4 "Interim rates are not limited to emergency situations as appellant contends." *Id.*, 160  
5 Ariz. 287, 772 P.2d 1140, *relying on Mountain States Tel. & Tel. Co.*, 71 Ariz. 404, 228 P.2d  
6 749 (1951).

7 More recently, in 2001, the Court of Appeals addressed the issue in *Residential Utility*  
8 *Consumer Office v. Arizona Corporation Commission*, 199 Ariz. 588, 591 ¶11, 20 P.3d 1169,  
9 1172 (App. 2001). In *Residential Utility Consumer Office*, however, the Court concluded:

10 "Clearly, *Scates* contemplated, and we agree, that interim rate  
11 making requires all three elements – an emergency situation, the posting of  
12 a bond, and a subsequent full rate case-in order to comport with the  
constitutional mandate that rates be just and reasonable." *Id.*, at 592, ¶17,  
20 P.3d at 1173.

13 The Court of Appeals further distinguished *Pueblo del Sol* concluding that the *Pueblo*  
14 *del Sol* Court "... misstated the test set forth in *Scates*:"

15 "We do not believe the *Pueblo del Sol* to be an "interim rate" case as  
16 contemplated by *Scates*, The Commission's approval on *Pueblo del Sol*  
was, in effect, an approval of the continued use of a previously authorized  
rate." *Id.* ¶16.

17 Not surprisingly, the Company favors *Mountain States* and *Pueblo del Sol* for its legal  
18 conclusion that an emergency finding is not necessary for approval of interim relief. Company  
19 Brief at 5-9. A fair and honest reading of these cases in their totality more persuasively  
20 supports the legal conclusion that a finding of an emergency is necessary in order to approve  
21 interim rates.

## 23 **AN EMERGENCY DOES NOT EXIST IN THIS CASE**

24 The Company urges the Commission to use its broad ratemaking powers to fashion  
appropriate interim relief under the circumstances of this case. Company Brief at 5. However,

1 it is a stretch to assert that the case law in Arizona suggests that the Commission should  
2 broadly construe a very limited exception to the state's Constitutional fair value requirement.  
3 In fact, the Commission argued that *Scates* be applied liberally and that its power to set interim  
4 rates was not limited to emergency situations in *Residential Utility Consumer Office*. The  
5 Court of Appeals concluded a restrictive interpretation was required. *Residential Utility*  
6 *Consumer Office v. Arizona Corporation Commission*, 199 Ariz. 588, 592 ¶¶16-¶18, 20 P.3d  
7 1169, 1173 (App. 2001). The Commission should not make the same mistake it did in  
8 *Residential Utility Consumer Office* and apply a liberal interpretation of *Scates*.

9 Nor should the Commission use its broad ratemaking powers to expand the definition of  
10 an emergency to fit the Company's current circumstances. Once again the Attorney General's  
11 Opinion is instructive;

12 "The foregoing authorities make it clear that, in general, courts and  
13 regulatory bodies utilize interim rates as an emergency measure when  
14 sudden change brings hardship to a company, when the company is  
15 insolvent, or when the condition of the company is such that its ability to  
16 maintain service pending a formal rate determination is in serious doubt."  
17 71-17 Op. Atty. Gen. at 13.

18 The Company admits that a denial of interim rates will not result in bankruptcy, place  
19 the Company in receivership, or even affect the Company's ability to pay dividends. Transcript  
20 at 150. The Company seeks a far more liberal construction of "emergency" than the Attorney  
21 General's definition. The Company argues the Commission's ratemaking authority is broad  
22 enough to cover the dire financial situation the Company currently faces. Company Brief at 10.  
23 Among the factors to be considered, the Company claims the Commission should consider its  
24 prior earnings, financing difficulties, and threats of a rating downgrade. *Id.* The Attorney  
General's Opinion is dispositive on those considerations in general:

1           "Perhaps the only valid generalization on this subject is that interim  
2 relief is not proper merely because a company's rate of return has, over a  
3 period of time, deteriorated to the point that it is unreasonably low. In other  
4 words, interim rate relief should not be made available to enable a public  
5 service corporation to ignore its obligations to be aware of its earning  
6 position at all times and to make timely application for rate relief, thus  
7 preserving its ability to render adequate service to pay a reasonable return  
8 to its investors." 71-17 Op. Atty. Gen. at 13.

9           It is worth repeating that the Company's request for the specific amount of \$115 million  
10 is not supported by the record and is arbitrary. The Commission should only consider facts  
11 that are tangible and not be persuaded by verbal representations. At the very least, such  
12 hearsay should be supported by an abundance of evidence in the record to make up for its  
13 unreliability. The evidence in this record equally supports the opposite conclusion – a  
14 downgrade is not imminent. See RUCO Brief at 3-8, and Staff Brief at 6-35. Moreover, even  
15 the Company admits that the amount of money that it will need to recover on an interim basis  
16 to satisfy the credit agencies is unknown. Company Brief at 21. The Company leaves open  
17 the possibility that the Commission could approve the interim request of \$115 million and the  
18 Company's credit rating would still be downgraded.

19           The Company claims that the \$115 million figure is convenient and will minimize the  
20 impact on ratepayers since ratepayers were paying a nearly identical interim PSA charge until  
21 August. Company Brief at 27. This argument is also not persuasive. It actually is disrespectful  
22 to the Company's customers. It is never right for ratepayers to overpay. It certainly is not right  
23 for ratepayers to overpay in order to keep rates consistent. If ratepayers are entitled to a  
24 reduction, ratepayers should get a reduction. The same holds true if rates should increase.  
The notion that customer's will be confused by rate fluctuations should be rejected.

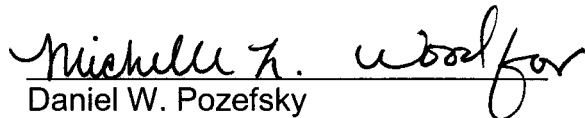
          In truth, the Company's entire case is thin. The Company explains its need for interim  
rates based on verbal representations from a third party that have not been authenticated,  
corroborated or even verified in any legal manner. The Company admits that the amount of

1 money it will take to satisfy the credit agencies is unknown and speculative. The evidentiary  
2 concern is even more troubling given the amount of money the Company seeks. The  
3 Commission should weigh the evidence presented in the entire record and reject the  
4 Company's request for interim rates.

5  
6 **CONCLUSION**

7 Based on Arizona case law, precedent, and the tried-and-true procedural traditions of  
8 the Arizona Corporation Commission, the Commission should deny the Company's request for  
9 interim relief. However, the great uncertainty occasioned by recent market turmoil should give  
10 the decision-makers in this matter pause, and the judge and Commissioners would do well to  
11 take their time to allow a reasonable perspective of recent market events to inform the ultimate  
12 decision in this matter.

13  
14 RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of October, 2008

15  
16   
17 Daniel W. Pozefsky  
Chief Counsel

18 AN ORIGINAL AND THIRTEEN COPIES  
19 of the foregoing filed this 8<sup>th</sup> day  
of October, 2008 with:

20 Docket Control  
21 Arizona Corporation Commission  
22 1200 West Washington  
23 Phoenix, Arizona 85007  
24

1 COPIES of the foregoing hand delivered/  
2 mailed this 8<sup>th</sup> day of October,2008 to:

3 Lyn Farmer  
4 Chief Administrative Law Judge  
5 Hearing Division  
6 Arizona Corporation Commission  
7 1200 West Washington  
8 Phoenix, Arizona 85007

9 Janice Alward, Chief Counsel  
10 Legal Division  
11 Arizona Corporation Commission  
12 1200 West Washington  
13 Phoenix, Arizona 85007

14 Ernest Johnson, Director  
15 Utilities Division  
16 Arizona Corporation Commission  
17 1200 West Washington  
18 Phoenix, Arizona 85007

19 Timothy M. Hogan  
20 Arizona Center for Law in the  
21 Public Interest  
22 202 E. McDowell Road, Suite 153  
23 Phoenix, AZ 85004

24 Jeff Schlegel  
25 SWEEP Arizona Representative  
26 1167 W. Samalayuca Dr.  
27 Tucson, AZ 85704-3224

28 David Berry  
29 Western Resource Advocates  
30 P. O. Box 1064  
31 Scottsdale, AZ 85252-1064

32 Jay I. Moyes, Esq.  
33 Karen E. Nally, Esq.  
34 Moyes Sellers & Sims  
35 1850 N. Central Avenue, Suite 1100  
36 Phoenix, Arizona 85004

37 Jeffrey J. Woner  
38 K.R. Saline & Assoc., PLC  
39 160 N. Pasadena, Suite 101  
40 Mesa, AZ 85201

Michael M. Grant  
Gallagher & Kennedy, P.A.  
2575 East Camelback Road  
Phoenix, Arizona 85016-9225

Lawrence V. Robertson, Jr.  
Theodore Roberts  
Attorneys At Law  
P. O. Box 1448  
Tubac, AZ 85646

Michael L. Kurtz, Esq.  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202

Corporate Energy Manager (G09)  
The Kroger Co.  
1014 Vine Street  
Cincinnati, Ohio 45202

Scott Canty, General Counsel  
The Hopi Tribe  
P. O. Box 123  
Kykotsmobi, AZ 86039

C. Webb Crockett  
Patrick J. Black  
Fennemore Craig, P.C.  
3003 N. Central Avenue, Suite 2600  
Phoenix, AZ 85012-2913

Kevin Higgins  
Energy Strategies, LLC  
Parkside Towers  
215 South State Street, Suite 200  
Salt Lake City, Utah 84111

Gary Yaquinto, President  
Arizona Investment Council  
2100 N. Central Avenue, Suite 210  
Phoenix, Arizona 85004

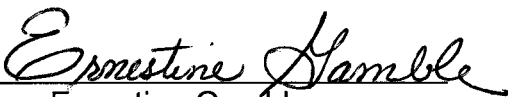
1 Thomas L. Mumaw  
Pinnacle West Capital Corporation  
2 Law Department  
P. O. Box 53999  
3 Mail Station 8695  
Phoenix, Arizona 85072-3999

4 Barbara Klemstine  
5 Zachary Fryer  
Susan Casady  
6 Pinnacle West Capital Corporation  
P.O. Box 53999  
7 Mail Station 9708  
Phoenix, Arizona 85072-3999

8 Robert Metli  
9 Snell & Wilmer  
One Arizona Center  
10 400 East Van Buren Street  
Phoenix, Arizona 85004-2202

11 Michael A. Curtis  
12 William P. Sullivan  
Larry K. Udall  
13 Curtis, Goodwin, Sullivan, Udall  
& Schwab, P.L.C.  
14 501 East Thomas Road  
Phoenix, Arizona 85012-3205

15 Cynthia Zwick  
16 1940 E. Luke Avenue  
Phoenix, AZ 85016

17  
18  
19 By   
Ernestine Gamble  
20 Secretary to Daniel Pozefsky